

It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art. (citations omitted)

As is well known in the law, one aspect of an obviousness rejection is that the differences in question, taken in combination with the claim as a whole, be obvious to *one skilled in the relevant art*. In Applicants' case, the claims, and the relevant art, are directed to paint, and the Examiner has failed to note any particular teaching in that art, or any analogous art to support her Official Notice. In that regard, the facts alleged in the Official Notice in this case are "not capable of instant and unquestionable demonstration." Therefore, it was improper to take such Notice in these circumstances, in the first instance, and more improper later to make the fact that Applicants did not address that Notice (because Applicants did not need, and were not required to), and turn that into "admitted prior art." Applicants object to this procedure, and simply want to make the record of this prosecution reflect that. Accordingly, Applicants disagree with any notion that Applicants have admitted that kind of subject matter to be prior art relevant to this case.

In light of the above, Applicants respectfully submit that the obviousness type double patenting rejection is improper. Notwithstanding the above, Applicants have filed a terminal disclaimer in compliance with 37 C.F.R. 1.321(c), solely for the purpose of expediting prosecution. The terminal disclaimer is not an admission by Applicants that Applicants present claims are obvious over claims 1, 2 and 5-18 of Friel, in view of Jahn.

Conclusion

In view of the foregoing, Applicants respectfully request the Examiner to allow the claims, as amended.

This Amendment and Response is filed by the undersigned registered patent attorney pursuant to 37 C.F.R. 1.34(a). It is requested that all correspondence with respect to this application be directed to the undersigned at the address noted below.

Respectfully submitted,

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